Supreme Court, U.S.
FILED

(1)

No. 02 497

SEP 23 20
OFFICE OF THE CLERK

In the Supreme Court of the United States

GREGORY LEEMING,

Petitioner,

versus

BURL CAIN, Warden

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Martin E. Regan, Jr.
Counsel of Record
Kris A. Moe
REGAN & ASSOCIATES, P.L.C.
2125 St. Charles Ave.
New Orleans, LA 70130
Tel: (504) 522-7260

Attorneys for Petitioner

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

85 1P

QUESTIONS PRESENTED

1. WHETHER LEEMING HAS DEMONSTRATED THAT JURISTS OF REASON WOULD FIND IT DEBATABLE THAT HIS PETITION STATES VALID CLAIMS OF THE DENIAL OF CONSTITUTIONAL RIGHTS, WARRANTING FEDERAL HABEAS RELIEF UNDER 28 U.S.C. 2254(d)(1).

2. WHETHER REASONABLE JURISTS WOULD FIND IT DEBATABLE THAT THE DISTRICT COURT WAS CORRECT IN ITS RULING.

LIST OF PARTIES

The parties to this case are the petitioner, Gregory Leeming, and respondent, Burl Cain, Warden, Louisiana State Penitentiary, Angola, Louisiana.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PRAYER 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

(A) Conduct of the Case in State Court 4
(B) Proceedings in Federal Court 7

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 18

APPENDIX A - United States Court of Appeals, Fifth Circuit, Order denying rehearing, dated June 27, 2002 ..... A-1

APPENDIX B - United States Court of Appeals, Fifth Circuit, Order denying COA dated May 29, 2002 ..... A-2

APPENDIX C - United States District Court, Eastern District of Louisiana Order & Reasons denying Certificate of Appealability, dated January 15, 2002 ..... A-5

APPENDIX D - United States District Court, Eastern District of Louisiana Report & Recommendation U.S. Magistrate, dated October 5, 2001 .. A-8

APPENDIX E - Louisiana Supreme Court Order denying supervisory writs on the denial of post-conviction relief by the state courts below, dated April 28, 2000 ..... A-52

APPENDIX F - United States District Court, Eastern District of Louisiana Order Reopening Habeas Petition, dated May 24, 2000 .. A-53

APPENDIX G - Jefferson Parish Correction Center Health Screening Form, dated 12-30-90 ..... A-55

APPENDIX H - Stephanie Doster. *Decision on campaign cash delayed; Judge Bodenheimer in limbo on paying for criminal defense*, Times-Picayune, September 13, 2002 ..... A-58

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. CONST., Amend. V 2,15
U.S. CONST., Amend. VI 2
U.S. CONST., Amend. XIV 3,15

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2254 2
28 U.S.C. § 2254(a) 3
28 U.S.C. § 2254(d)(1) 3,8
28 U.S.C. § 2254(e)(1) 9

La. R.S. 14.30.1 4
La. C.Cr.P. Art. 930. 7

CASES

Hohn v. United States, 524 U.S. 236 (1998) 2
Slack v. McDaniel, 529 U.S. 473 (2000) 4
State v. Leeming, (La. App. 5th Cir. 12/29/92),
612 So. 2d 308. 4
State v. Leeming, No. 93-K-0308 (La. 4/12/93)
616 So. 2d 4
Lindh v. Murphy, 117 S. Ct. 2059 (1997) 8
Barefoot v. Estelle, 463 U.S. 880 (1983) 8
Williams v. Taylor, 529 U.S. 362 (2000) 9
Brady v. Maryland, 373 U.S. 83 (1963) 9
United States v. Bagley 473 U.S. 667 (1985) 10
Blackburn v. Alabama, 361 U.S. 199, 206 (1960) 11
Kimmelman v. Morrison, 477 U.S. 365 (1986) 13
Strickland v. Washington, 466 U.S. 668 (1984) 14
Lockhart v. Fretwell, 506 U.S. 364, 371 (1993) 14
Morgan v. Illinois, 504 U.S. 719 (1992) 15
Smith v. Phillips 455 U.S. 209 (1982) 15

RULES

U.S. Sup. Ct. Rule 13.3 2

TEXTS

ABA Standards Relating to the Administration
of Criminal Justice, Chapter 4.
"The Defense Function" (West 1999) 17

PRAYER

Petitioner Gregory Leeming respectfully requests that this Court issue a writ of certiorari granting review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 29, 2002, rehearing denied on June 27, 2002, to address the important questions of federal law presented herein.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability ("COA"), triggering this petition, is *Leeming v. Cain*, #01-31441, (May 29, 2002, rehearing denied June 27, 2002), and is not reported. A copy of the order denying a COA is attached to this petition as **Appendix A**. A copy of the order denying rehearing is attached as **Appendix B**.

The United States District Court, Eastern District of Louisiana, denied a COA, #98-3053, Sec. "T"(6) of Leeming's habeas petition on January 15, 2002. A copy of the Order and Reasons is included as **Appendix C**. The judgment of the district court denying relief is unreported. The Magistrate's Report & Recommendation denying Leeming's petition for habeas relief pursuant to 28 U.S.C. § 2254 on October 5, 2001, is included as **Appendix D**.

The Louisiana Supreme Court denied Leeming's petition for writ of certiorari on April 28, 2000, seeking review of the denial of post-conviction relief by the state trial court, reported at State ex rel. Leeming v. State 1999-2998 (La. 04/28/00); 760 So. 2d 1168. A copy of the judgment is included as **Appendix E**. This judgment denied review of Leeming's final petition for state post conviction relief. He had earlier filed a federal 28:2254

petition with the United States District Court on November 12, 1998, which was dismissed without prejudice for failure to exhaust state remedies. Leeming was allowed to re-open his 28:2254 petition after the decision rendered by the Louisiana Supreme Court on April 28, 2000. The district court order granting his application for writ of habeas corpus is attached at **Appendix F**.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Court of Appeals' judgment denying a certificate of appealability and affirming the ruling of the District Court denying Leeming's petition as untimely was entered on May 29, 2002. Leeming timely petitioned for rehearing, and the Court of Appeals denied rehearing on June 27, 2002. Consequently, this Court has jurisdiction under 28 U.S.C. § 1254(1). *Cf. Hohn v. United States*, 524 U.S. 236 (1998) (so holding as to jurisdiction over denials of COA for motions filed under 28 U.S.C. § 2255, applying the same statutes and law which govern habeas petitions filed under 28 U.S.C. § 2254). *See* Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the

right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, ...and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

...nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, United States Code, Section 2254 provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> * * *

28 U.S.C. 2254(d)(1) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

> Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in the light of evidence presented in the State court proceeding.

STATEMENT OF THE CASE

The issue before the Court concerns the Court of Appeals' denial of a certificate of appealability ("COA") requested by Leeming and the underlying rulings by the District Court denying his habeas petition because of a failure to state a valid claim of the denial of a constitutional right," *Slack v. McDaniel*, 529 U.S. 473 (2000) The facts and proceedings necessary to the issues before the Court follow.[1]

A. CONDUCT OF THE CASE IN STATE COURT

Gregory Leeming was convicted by a split verdict, 10-2, on December 18, 1991, in Jefferson Parish District Court, Gretna, Louisiana, of the second degree murder[2] of Caroline Alford, a prostitute, on December 29, 1990. The homicide occurred while Gregory Leeming was in an alcoholic blackout, after five days of binge drinking. He entered a plea of not guilty and not guilty by reason of insanity. A motion to suppress his confession was heard and denied by the trial court on August 13, 1991. Trial was held in December, 1991 and ran six days. He was sentenced to life imprisonment without benefit of parole, probation or suspension

---

[1] Minimal other factual and procedural background, beyond what is strictly necessary, is provided to afford a complete picture.

[2] A violation of La. R.S. 14.30.1.

of sentence. His conviction was affirmed by the Louisiana Court of Appeal. *State v. Leeming*, (La. App. 5th Cir. 12/29/92), 612 So. 2d 308. He sought and was denied discretionary review in the Louisiana Supreme Court. *State v. Leeming*, No. 93-K-0308 (La. 4/12/93) 616 So. 2d 681.[3]

Leeming, *pro se,* timely filed his first application for post-conviction relief in the trial court on April 4, 1996, which denied relief on February 24, 1997. Both the Louisiana Fifth Circuit Court of Appeal and the Louisiana Supreme Court denied review on May 16, 1997, and November 7, 1997, respectively. Leeming's second post conviction application was denied by all three state courts between June 1999 and April 2000.

Since the beginning of his search for post-conviction relief, Mr. Leeming urged that his right to due process under the United States Constitution was violated by the state's failure to turn over an intake form showing his intoxication when he confessed. Minutes after a health screening form was completed by intake officers, stating that Leeming was an "INTOXICATED ALCOHOLIC", (attached as **Appendix G**), Detectives rushed Leeming into an interview room, put a rights waiver before him and turned on the tape recorder. Leeming initialed the waiver and delivered his anesthetized, oddly detached and inappropriately verbose confession. The interview was taped twenty-two minutes after Leeming was processed by the intake officer. Officer testimony at trial that Leeming did not appear intoxicated was belied by one detective who "had to tell him to shut up several times because he kept telling us things and I made sure that his rights was given to him." Another detective testified that Leeming asked for a beer while waiting for transport to the police

---

[3] Although Chief Justice Calogero, Justice Dennis, and Justice Ortique dissented, and *would have granted the writ.*

station. The health screening form was pivotal to the voluntary and knowing character of Gregory Leeming's interview and confession, and was never produced at the suppression hearing. Nor was it ever made clear, through an evidentiary hearing, why the state suppressed the form, and why counsel failed to object to nondisclosure at trial, and request a mistrial. Even though the health screening form indicated that Leeming was an intoxicated alcoholic, no blood alcohol or breath test was performed, although Leeming, in his pre-interview remarks to police, said that he had just gotten out of an alcohol treatment center in California prior to coming to New Orleans. Beer cans littered the room where he was arrested. Evidence presented at trial showed Leeming's chronic alcoholism resulted in blackouts, depression, and suicidal tendencies. Leeming, seeking help for his addiction, was hospitalized in at least seven different alcohol rehabilitation facilities. On the night of the killing, Leeming had been on a five day binge, staying at a motel on Airline Highway and drinking at a nearby bar, non-stop, except for blackouts.

The state courts insisted throughout Leeming's quest for post conviction relief that he was not prejudiced by the State's failure to turn over the intake form prior to the third day of trial because the jury heard this information prior to deliberations, and counsel re-urged his motion to suppress. However, the courts below have never squarely addressed whether the trial court would have admitted the confession if it had heard the undisclosed material *and* the undisclosed witness, and how this impacted the intoxication defense at the suppression hearing. Presented with the information, the state could not have carried its burden to show beyond a reasonable doubt that Leeming's confession was free and voluntary, and not the product of police coercion.

The state courts also found that Leeming's counsel was not ineffective and that he proceeded in a fully prepared manner.

Leeming asserts that his appointed counsel was not prepared and was woefully inadequate in presenting his intoxication defense, both at the motion to suppress, and at trial. The lack of pretrial investigation and failure to call witnesses in Leeming's defense are factual questions normally resolved in an evidentiary hearing pursuant to statute[4], *repeatedly denied* by the courts. For example, the record disclosed his counsel's failure to challenge a biased juror, Mrs. Payton, who stated she was unable to find someone not guilty of a homicide based on an alcohol-intoxication defense. The state courts did not find counsel's judgment in failing to strike this juror, either for cause, or peremptorily, to be deficient or prejudicial. Predictably, the juror found Leeming guilty, providing the swing vote for a 10-2 conviction.

B. PROCEEDINGS IN FEDERAL COURT

The district court denied a certificate of appealability, adopting the Report and Recommendation of the Magistrate Judge. (See Appendix C, and D) This Report included much of the state court appellate opinion. Leeming vigorously argues that the Magistrate never addressed his contentions raised on collateral review regarding the due process violation of the state's exclusion of evidence at the motion to suppress, and the impact on Leeming's trial defense. The Magistrate failed to address counsel's ineffectiveness in failing to call witnesses (Leeming's mother for instance, whom Leeming called during his blackout at the motel in the morning hours following the murder, and would have testified that he was "out of his mind"), to seek expert testimony on the effects of alcohol over a five day period, and on

---

[4] La. C.Cr.P. Art. 930. Evidentiary Hearing. "An evidentiary hearing shall be ordered whenever there are questions of fact which cannot properly be resolved pursuant to Articles 928 and 929."

the day of the murder, or the failure of counsel to strike a biased juror. Citing the appellate opinion, that "...the record does not indicate the juror at issue was actually biased or impartial", the Magistrate's Report uncritically adopted the state appellate opinion citing the voir dire of the juror, which amply demonstrates the juror's reluctance to follow the law on intoxication defense. (See Appendix D, A-40, 41)

The United States Fifth Circuit Court of Appeal, relying on the lower court's adoption of the Report and Recommendation of the Magistrate, similarly found that Gregory Leeming had failed to state a valid claim of a constitutional right. Leeming contends that the Court of Appeals failed to address the unreasonable application of clearly established Federal law (the state's failure to turn over evidence at his motion to suppress hearing and at trial, and his counsel's deficient performance throughout the proceedings) by the state courts, and sanctioned a decision that was based on an unreasonable determination of the facts in the light of evidence presented in the State court proceedings. He contends that jurists of reason would find it debatable that he has presented valid constitutional claims, and seeks this Honorable Court's supervisory jurisdiction.

REASONS FOR GRANTING THE PETITION

Leeming's original petition for federal habeas relief was filed on November 12, 1998, and is governed by the provisions of the AEDPA. See Lindh v. Murphy, 138 L. Ed. 2d 481, 117 S. Ct. 2059, No. 96-6298, 1997 WL 338568 (U.S. June 23, 1997). Under 28 U.S.C. § 2253(c)(1)(A), Leeming must first obtain a COA before he may obtain appellate review of the district court's denial of habeas relief. A COA can issue only if Leeming makes a "substantial showing of the denial of a constitutional right." Id. § 2253(c)(2). Such a showing "requires the applicant to 'demonstrate that the issues are debatable among jurists of reason;

that a court could resolve the issues (in a different manner); or that the questions are adequate to deserve encouragement to proceed further. Barefoot v. Estelle, 463 U.S. 880, 893, 77 L. Ed. 2d 1090, 103 S. Ct. 3383.

The Court of Appeals must defer to the state court unless its decision "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A decision is contrary to clearly established Federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389. (2000).Under § 2254(d)(1)'s "unreasonable application" language, a writ may issue "if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. 362, 120 S. Ct. at 1523. Factual findings are presumed to be correct, see 28 U.S.C. § 2254(e)(1), and the Court of Appeals will give deference to the state court's decision unless it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. § 2254(d)(2).

A. The state courts' determination that Leeming was not prejudiced by the State's withholding of material evidence (because that evidence was presented on the third day of trial) was objectively unreasonable under the facts of this case, and contrary to this Court's well-established precedents.

That an accused's constitutional rights are violated when the State withholds material evidence affecting the credibility of witnesses is well-established.

Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment.

In general, a petitioner seeking habeas relief who asserts that the State violated its duty to disclose material evidence must demonstrate that (1) the prosecution withheld evidence, (2) the evidence was favorable to the petitioner, and (3) the evidence was material. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985). As this Court has noted, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995).

The United States Fifth Circuit Court of Appeal, following the courts below, failed to address Leeming's contention that the nondisclosure of the health screening form prior to the suppression hearing meant that his counsel was unable to inform the judge *at the suppression hearing* that Gregory Leeming's confession was obtained not only while he was drunk, but that his admissions to detectives raised a reasonable doubt as to whether he was aware of what he was saying, and whether he was cognizant of his rights. The trial court could not have found beyond a reasonable doubt that Leeming's confession was knowing and voluntary if the health screening form had been disclosed, and witnesses been called to testify. Nor was the court able to appreciate the circumstances in which the police hurried Leeming into a taped interview, despite their testimony that he was not drunk. The trial judge's

determination at the motion to suppress as to the admissibility of the confession was confined to the evidence presented in that hearing. After three days of trial and unimpeached testimony by state witnesses, the trial court was not about to suppress that confession.

The failure of the state to produce the intake form until the third day of trial, compromised Leeming's right to due process and a fair trial. First, Leeming was drunk when police picked him up. He was talkative as well. After being booked and observed by the intake officer as an intoxicated alcoholic, Leeming was taping his confession, twenty minutes later. But for this confession, the state would have been unable to prove specific intent, an element of the second degree murder charge for which Gregory Leeming was convicted. Inability to rebut the State's contention that Leeming's confession was knowing and voluntary *at the motion to suppress hearing* meant the difference between a life sentence for second degree murder and a lesser sentence under the manslaughter statute, which at the time of the offense provided a maximum sentence of twenty-one years. The likelihood that the court would have suppressed Leeming's confession is more probable than not given the unmistakable impressions of the intake officer twenty minutes prior to Leeming's confession. Competent counsel would have been able to show that the confession was made involuntarily and the result of police coercion. The state could not prove beyond a reasonable doubt that his confession was free and voluntary.[5]

---

[5] Interestingly, police elicited from Leeming that police had been "real nice". It is also noteworthy that an intake officer could identify an intoxicated alcoholic but three detectives see no evidence of intoxication at all. This Court has recognized that coercion can be mental as well as physical, and that "the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v.

Second, Leeming's trial strategy was adversely affected because of the state's withholding of the health screening form. After the highly inculpatory confession was presented to the jury. Leeming was faced with testifying, as his testimony could not have harmed him more than the confession. If the evidence had been produced prior to the motion to suppress hearing, and the confession suppressed, as was likely, Leeming would not have testified, the state would not have proved specific intent, and the outcome would have been different. The untimely disclosure of the health screening form also prevented defense counsel from bolstering Leeming's intoxication defense both at the motion to suppress, and at trial, prevented impeachment of detectives, and contributed to Leeming's reluctant decision to testify. The health screening form memorialized the observation of the intake officer, who processed Leeming at 2:05 p.m. on December 30, 1990. Because Leeming was arrested at 1:00 p.m., the effects of his alcohol consumption show how really drunk he was. The state presented no evidence other than the confession, of specific intent to commit the crime of second degree murder, thus materiality of the undisclosed evidence relating to his intoxicated condition at the time of his confession is evident, and the prejudice to his defense apparent.

Third, the circumstances surrounding the disclosure are troubling and warranted closer scrutiny than was afforded by the courts below. The record reflects that when the health screening form finally surfaced during the third day of trial, the following colloquy ensued at a bench conference, where the prosecutor tried to prevent its admission into evidence:

> DISTRICT ATTORNEY BODENHEIMER:
> "Where did you get that form from,I've never seen it."

Alabama, 361 U.S. 199, 206 (1960).

DEFENSE COUNSEL:
"You know where I got it from, I got it from you guys, I didn't make it up."

DISTRICT ATTORNEY BODENHEIMER:
"I've never seen it." (Trial transcript, 1240-1241)

The district attorney denied - three times - that he had ever seen the form. His palpable anger and embarrassment prompted an initial objection to the admission of the evidence, but he soon withdrew his objection. In rebuttal closing argument, District Attorney Ronald Bodenheimer puffed that *he* produced (and interviewed prior to Murphy's testimony) the intake officer, Michael Murphy for the jury. (Trial Transcript, 1268) D.A. Bodenheimer eventually ran and was elected to state district court judge in the same parish where Gregory Leeming was tried, convicted, and attempted unsuccessfully to obtain a post conviction evidentiary hearing. Judge Bodenheimer was indicted in July, 2002, for allegedly conspiring to plant the painkiller OxyContin in the truck of a man who had complained of drug activity and zoning violations at the judge's Venetian Isles marina. (See Appendix H).

The state court determination that the undisclosed evidence at the motion to suppress did not prejudice Leeming's defense was an unreasonable application of Brady and its progeny to the facts of this case.

B. The lower courts' determination that counsel was effective rested upon an unreasonable application of clearly established Supreme Court law.

"The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." Kimmelman v. Morrison, 477 U.S. 365 at

374; 106 S. Ct. 2574 at 2582; 91 L. Ed. 2d 305 (1986).

The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. Strickland v. Washington, 466 U.S. 668 at 686; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984), United States v. Cronic, 466 U.S. 648, 655-657 (1984). In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, Strickland, 466 U.S., at 688, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id., at 694.

To determine the adequacy of counsel's performance necessitates "Judg[ing]...counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct". Lockhart v. Fretwell, 506 U.S. 364, 371 (1993), citing Strickland v. Washington, 466 U.S. 668 at 690; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984) "An attorney's performance, which enjoys a strong presumption of adequacy, is deficient if it is objectively unreasonable." Strickland, 466 U.S. at 688.

If counsel's performance is determined to be deficient, Leeming must show that his defense was prejudiced by the deficiency to the extent that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. According to Strickland, a "reasonable probability" must be "sufficient to undermine confidence in the outcome." *Id.*

A review of the record reveals counsel's general confusion throughout the trial, angering the trial judge, and compromising Leeming's defense. Counsel failed to present a coherent intoxication defense and completed his closing argument

focused on the "heat of passion" element of a manslaughter defense. At one point counsel was so befuddled he was objecting to his own objections. Repeatedly admonished by the trial court for leading witnesses, he offered protracted "explanations" for his inability to examine or cross-examine. The trial judge said to defense counsel on more than one occasion, "I don't know what you're talking about."

Perhaps the most egregious deficiency was the failure to challenge, for cause or peremptorily, a biased juror who unequivocally stated she was unable to put aside her "feelings" and follow the law on the defense of intoxication. After determining that the juror was biased, counsel inexplicably failed to strike her from the jury. That juror was the swing vote that convicted Gregory Leeming.

The Fifth Circuit, relying on the Report and Recommendation of the District Court, stated that "A review of the record does not indicate that the juror at issue was actually biased or impartial." (App. A-4) With all respect, the juror clearly stated her bias against Leeming's core defense and was allowed to remain on jury, infecting the decisionmaking process of other jurors, and casting the decisive vote to convict Leeming. The Magistrate's Report and Recommendation, adopted by the District Court, attributed this gross error as "trial strategy" (App. A-42) Counsel's failure to remove this juror was fatal to Leeming's intoxication defense, and contributed to an unreliable outcome. The juror clearly expressed to defense counsel, after equivocating somewhat before the trial court, that she would more likely than not be unable to set aside her bias toward an intoxication defense. (App. 41-42) The measure of a jury is taken by reference to the impartiality of each, individual juror. Morgan v. Illinois, 504 U.S. 719 at 735; 112 S. Ct. 2222; 119 L. Ed. 2d 492 (1992). " Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge

ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips 455 U.S. 209 at 217; 102 S. Ct. 940 at 946; 71 L. Ed. 2d 78 (1982). The actual bias of the juror (evident from the record), the failure of the trial court to protect the integrity of the proceedings, and the incompetence of counsel in failure to challenge the juror rendered Leeming's trial fundamentally unfair, violating his Fifth and Fourteenth Amendment constitutional rights to due process and his Sixth Amendment constitutional rights to the effective assistance of counsel and the right to be tried by an impartial jury.

Further evidence of counsel's deficient performance is also apparent from the record. At the motion to suppress hearing, counsel was so unprepared that he asked Leeming to sit at the table with him to "assist him". The court inquired whether he had seen discovery and counsel could not remember. The court relied on the prosecutor's statement that *he* had shown defense counsel the "open file". If counsel had prepared for the suppression hearing, he would have produced those witnesses who were prepared to testify as to Leeming's intoxication, such as his mother, who spoke with the petitioner shortly before his arrest. An evidentiary hearing would have demonstrated that witnesses were available to defense counsel prior to the motion to suppress, that he failed to produce expert testimony as to Gregory Leeming's chronic alcoholism and blackouts, and the effects of a five day drinking binge on an individual's blood alcohol content.

The Magistrate's Report and Recommendation lists omnibus motions filed by defense counsel as evidence of his professional competence, but more is required than computer-generated forms. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at

690-691, 104 S. Ct. at 2066. If counsel had communicated with his client, conducted appropriate investigations, and produced witnesses congruent with the intoxication defense, the outcome of this proceeding would have been different. The decision not to prepare this defense was not reasoned, and not strategic. Leeming suggests that counsel was not performing within the context of the Sixth Amendment, nor did he perform according to well-established standards established by the American Bar Association and approved by this Court. For example,

> Standard 4-4.1 Duty to Investigate
> (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duties to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

ABA Standards Relating to the Administration of Criminal Justice, Chapter 4. "The Defense Function" (West 1999). The Court has expressly recognized this standard as an important guide in assessing whether or not counsel's performance has met minimal standards of proficiency. Strickland, 466 U.S. at 684, 104 S. Ct. at 2062, and Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 , 146 L.Ed.2d 389 (2000).

Leeming's intoxication defense depended on counsel's calling witnesses (four bartenders who worked during the five days Leeming was binge drinking), who would testify as to his chronic alcoholism, and experts who could offer scientific

chronic alcoholism, and experts who could offer scientific te: imony as to the effects on Leeming on the day of the murder. Failure to investigate and call witnesses, consult with his client, and secure information in the possession of law enforcement, was ineffective assistance of counsel.

Other examples of counsel's performance in the record, such as being prompted by the trial court as to whether he had an objection to over 40 photographs of the victim's body being admitted and then reviewed in the jury room during deliberations (he did not), failure to submit special written jury instructions on the consequences of a not guilty by reason of insanity verdict, failure to request or submit a special written jury charge on voluntariness (of confession), combine to show Leeming's attorney was not functioning as counsel guaranteed the Sixth Amendment of the United States Constitution.

CONCLUSION

This Court observed in Williams v. Taylor, *supra*, that "it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error. As Judge Easterbrook noted with respect to the phrase "contrary to":

> " 'Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails." *Lindh, 96 F.3d at 869.*'"

WHEREFORE, the foregoing reasons considered, this Court is respectfully urged to grant Gregory Leeming's petition for writ of certiorari.

New Orleans, Louisiana, this 20th day of September, 2002.

MARTIN E. REGAN, JR.
Counsel of Record
KRIS A. MOE
2125 St. Charles Avenue
New Orleans, Louisiana 70130
(504) 522-7260

Attorneys for Petitioner
Gregory Leeming

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-31441
USDC No. 98-CV-3053-T

FILED
JUN 27 2002

GREGORY LEEMING,

Petitioner-Appellant

v.

BURL CAIN, Warden, L
Louisiana State Penitentiary

Respondent-Appellee

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's petition for panel rehearing and reconsideration of denial of certificate of appealability, treated as a motion for reconsideration. IT IS ORDERED that the motion is Denied.

/s/ (initialed) EMJ, ECJ, JS

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-31441
USDC No. 98-CV-3053-T

FILED
MAY 29 2002

GREGORY LEEMING,

Petitioner - Appellant,

versus

BURL CAIN, Warden,
Louisiana State Penitentiary,

Respondent - Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ORDER:

Gregory Leeming, Louisiana prisoner #308687, has filed a motion for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 federal habeas petition. Leeming must obtain a COA to proceed on appeal. See 28 U.S.C. § 2253 (c) (1). To obtain a COA, Leeming must make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253 (c) (2). To make such a showing, the applicant must demonstrate that his motion involves issues which are debatable among reasonable jurists, that a court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further. Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 531 U.S. 966 (2000). When the district court has dismissed a 28 U.S.C. § 2254 petition on

procedural grounds without reaching the merits of the petitioner's claims, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (emphasis added).

Leeming argues that his confession was unknowing and involuntary because he was intoxicated at the time that he made the statement. The state court's factual determination that Leeming was not intoxicated at the time he made the statement is presumed correct. 28 U.S.C. § 2254 (e) (1). Leeming has not met his burden to rebut this presumption of correctness with clear and convincing evidence. Id. The state record indicates that Leeming was advised of his constitutional rights, that he was not intoxicated at the time he made the statement, and that he knowingly and voluntarily waived his constitutional rights before making the statement.

Leeming argues that the evidence was not sufficient to support his conviction for second-degree murder. He argues that there was no evidence that he had the specific intent to kill the victim as he was so intoxicated at the time of the murder that he was incapable of forming specific intent. A review of the record indicates that a rational trier of fact could have found beyond a reasonable doubt that Leeming was guilty of second-degree murder and that the evidence did not support Leeming's defense that he was too intoxicated to form the specific intent to kill the victim. See Jackson v. Virginia, 443 U.S. 307, 324 (1979).

Leeming argues that the State withheld a health screening form on which Officer Michael Murphy, the booking officer, noted that Leeming was under the influence of alcohol and that he was an intoxicated alcoholic. Because the State disclosed this document to Leeming during the trial and his trial counsel was able to bring it to the attention of the jury, Leeming has not shown that the State withheld the evidence in violation of Brady v.

Maryland, 373 U.S. 83 (1963).

Leeming argues that the selection of grand jury members and foremen was discriminatory in violation of Campbell v. Louisiana, 523 U.S. 392 (1998). The state habeas court determined that this claim was procedurally barred because Leeming did not file a pretrial motion to quash the indictment. This requirement is an independent and adequate state ground for denying relief. See Williams v. Cain, 125 F.3d 269, 274-76 (5th Cir. 1997). Leeming has not shown cause and prejudice or that the court's failure to consider this issue will result in a miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991). Therefore, he has not shown that reasonable jurists would debate whether the district court erred in dismissing this claim as procedurally barred. See Slack, 529 U.S. at 484.

Leeming argues that his counsel was ineffective in that he did not challenge a biased juror for cause or use a peremptory strike to remove the juror. A review of the record does not indicate that the juror at issue was actually biased or impartial. See Ross v. Oklahoma, 487 U.S. 81, 85 (1998); Soria v. Johnson, 207 F.3d 232, 239 (5th Cir. 2000).

Leeming argues that the cumulative impact of the errors deprived him of a fair trial. Because Leeming has not demonstrated that constitutional errors occurred during his trial or appeal, he has not demonstrated that cumulative errors deprived him of a fair trial. See Livingston v. Johnson, 107 F.3d 297, 308-09 (5th Cir. 1997); Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir. 1992) (en banc).

Leeming has not made a substantial showing of the denial of a constitutional right concerning any of his claims. See 28 U.S.C. § 2253 (c) (2). Accordingly, Leeming's COA motion is DENIED.

/s/ Emilio M. Garza
EMILIO M. GARZA
UNITED STATES CIRCUIT JUDGE

APPENDIX C

FILED
2002 JAN 15

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GREGORY LEEMING 308687
VERSUS
BURL CAIN, WARDEN

CIVIL ACTION
NO. 98-3053
SECTION "T" (6)

Before the Court is an Application for a Certificate of Appealability filed by Gregory Leeming. Having considered the record, the law, and the application submitted by the Petitioner, the Court hereby **DENIES** the Petitioner's request.

ORDER AND REASONS

I. Background

Petitioner Gregory Leeming is a state prisoner currently incarcerated at the Louisiana State Penitentiary, Angola, Louisiana. On December 18, 1991, after a six day jury trial on second degree murder, in violation of La. R.S. 14:30.1, petitioner was found guilty as charged and was subsequently sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The Louisiana Fifth Circuit Court of Appeal affirmed the conviction. *State v. Leeming*, 612 So.2d 308 (La. App. 5th Cir. 1992). The Louisiana Supreme Court later denied petitioner's writ application on April 12, 1993, thereby rendering his conviction and sentence final. *State v. Leeming*, 616 So.2d 681 (1993).

DATE OF ENTRY
JAN 15 2002

On April 8, 1996, petitioner sought post-conviction relief (PCR) in the state district court, which denied relief on February 24, 1997. Both the Louisiana Fifth Circuit Court of Appeal and the Louisiana Supreme Court denied petitioner's writs on May 16, 1997 and November 7, 1997 respectively. Petitioner's second application for PCR was denied relief in all three courts between June 1999 and April 2000.

On November 12, 1998 Gregory Leeming, *pro se*, formally filed his original *habeas corpus* petition with this Court. This original petition was dismissed for failure to exhaust state remedies on January 11, 1999. On April 27, 2001 petitioner's attorney filed a "Motion to Reopen Existing Application for Writ of Habeas Corpus or to File As a New Petition for Writ of Habeas Corpus and for Leave to File Petition for Writ of Habeas Corpus" on Leeming's behalf. The District Judge granted the motion on May 24, 2001. Petitioner's writ included nine groups for federal *habeas corpus* relief with a number of sub-sections. Although a review of the record by Magistrate Judge Louis Moore, Jr., indicated that Petitioner had exhausted his federal claims in the highest state courts, the Magistrate Judge recommended that the petition be denied. Leeming subsequently filed a timely written objection to the report and recommendation of the magistrate judge as required for appeal of the proposed findings and legal conclusions of the district court.

On November 8, 2001, after having reviewed the entire record, the memoranda submitted by the parties, the applicable law, and the Report and Recommendation of Magistrate Judge Moore, this Court denied Leeming's petition for a writ of *habeas corpus*.

II. Legal Analysis

Under 28 U.S.C. §2253(c), Leeming has no right of appeal from this Court's November 8, 2001 judgment; he must obtain a Certificate of Appealability. This Court may issue such a certificate "only if the applicant has made a substantial showing

of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

This Court finds that Leeming has not made such a showing. Each of the claims made by the Petitioner was adequately addressed by Magistrate Judge Moore in his thorough and well-reasoned Report and Recommendation submitted to this Court. After thoroughly reviewing the record, applicable law, and the application submitted by the Petitioner, this Court finds that the issues and arguments presented by Leeming in his request for a Certificate of Appealability already have been addressed, and are without merit.

Accordingly,

IT IS ORDERED that a Certificate of Appealability in the above captioned matter shall not be issued for the reasons stated herein.

New Orleans, Louisiana, this 15th day of January, 2002.

/s/ G. Thomas Porteous, Jr.
G. Thomas Porteous, Jr.
United States District Judge

APPENDIX D

FILED
2001 OCT 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GREGORY LEEMING	*	CIVIL ACTION
VERSUS	*	NO: 98-3053
BURL CAIN, WARDEN	*	SECTION: "T"(6)

REPORT AND RECOMMENDATION

This matter was referred to the United States Magistrate Judge for the purpose of conducting hearings, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to Title 28, United States Code, Sections 636(b)(1)(B) and (C), and, as applicable, Rule 8(b) of the Rules Governing Section 2254 cases. Upon review of the entire record, the Court has determined that this matter can be disposed of without an evidentiary hearing. For the reasons set forth below, it is recommended that the instant application for federal habeas relief be **DENIED WITH PREJUDICE**.

DATE OF ENTRY
OCT 9 2001

Procedural History

On November 12, 1998, Gregory Leeming, pro se, formally filed his original federal habeas corpus petition with this Court.[1] On November 27, 1998, the Court received a letter from petitioner, Gregory Leeming, stating that he desired to exhaust his state court remedies with respect to "the ***Campbell*** issue."[2] Leeming explained that "***Campbell v. Louisiana*** being so new, [he] did not raise it on Post-Conviction, however, [he] believes [he] should."[3] Leeming requested that this Court "hold" his

---

[1] Petitioner signed his petition on October 13, 1998. It was tendered for filing with the Clerk of Court on October 15, 1998. Petitioner's application was formally filed on November 12, 1998. However, employing the "mailbox rule", a pleading filed by a prisoner acting pro se is considered to be filed for prescriptive purposes on the date it is delivered to prison officials for mailing, rather than the date it is received by the court. ***Cooper v. Brookshire***, 70 F.3d 377, 379 (5th Cir. 1995). Generally, the date a prisoner signs his petition, in this case, October 13, 1998, is presumed to be the date he delivered it to prison officials for mailing. *See* ***Colarte v. Leblanc***, 40 F. Supp.2d 816, 817 (E.D. La. 1999) (assumed that petitioner turned his habeas corpus application over to prison officials for delivery to this Court on the date he signed his application); ***Magee v. Cain***, 2000 WL 1023423, *4 n.2 (E.D. La. 2000) (inferred that filing date and signature date of habeas petition were the same); ***Punch v. State***, 1999 WL 56279, *2 n.3 (E.D. La. 1999) (may reasonably be inferred that prisoner delivered habeas petition to prison officials for mailing on date he signed petition).

[2] Fed. Rec. Doc. No. 3, Petitioner's letter dated "11/24/98."

[3] The case to which petitioner refers, ***Campbell v. Louisiana***, 523 U.S. 392, 118 S. Ct. 1419, 140 L.Ed.2d 551 (1998), was decided by the United States Supreme Court on April 21, 1998.

original petition while he proceeded to exhaust the **Campbell** issue through the Louisiana State courts. The Court construed Leeming's letter as a motion to amend his petition and as a motion to hold the petition in abeyance. It was recommended that the petition be dismissed for failure to exhaust, reserving to petitioner the right, following exhaustion of state remedies, to file a motion to reopen the case.[4] On January 11, 1999, the District Judge approved the Magistrate Judge's Report and Recommendation and ordered that the petition be dismissed without prejudice and that petitioner, within a reasonable time following the exhaustion of his state court remedies, shall be allowed, pursuant to the filing of an appropriate motion, to reopen this matter thereby retaining the instant action's filing date for prescription purposes.[5]

On May 24, 2001, that District Judge ordered that Petitioner's Motion to Reopen Existing Application for Writ of Habeas Corpus[6] (Doc. 15) be granted; that Leeming's Petition for Writ of Habeas Corpus, Doc. 1, be reopened; and that Leeming's Petition for Writ of Habeas Corpus retain its original filing date of November 12, 1998, for prescription purposes.[7]

Petitioner Gregory Leeming is a state prisoner currently incarcerated at the Louisiana State Penitentiary, Angola, Louisiana. On December 18, 1991, following a six day jury trial

---

[4] Fed Rec. Doc. No. 4, Report and Recommendation.

[5] Fed. Rec. Doc. No. 6, Order of District Judge.

[6] Petitioner is now represented by Attorney Cheryl Ann McAnespy-Smith. (Fed. Rec. Doc. No. 15.) Review of the petition attached to Doc. 15 shows that petitioner was represented by Attorney Gerard P. Archer on state PCR proceedings and on appeal of ruling. (See p.12, para. 15(f) and (g).

[7] Fed. Rec. Doc. No. 16, Order of District Judge.

on second degree murder, in violation of La. R.S. 14:30.1, petitioner was found guilty as charged. On February 20, 1992, petitioner was sentenced to serve life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.[8] Petitioner's conviction and sentence were affirmed by the Louisiana Fifth Circuit Court of Appeal, ***State v. Leeming***, 612 So. 2d 308 (La. App. 5th Cir. 1992), and the Louisiana Supreme Court denied petitioner's writ application on April 12, 1993, ***State v. Leeming***, 616 So.2d 681 (La. 1993), thereby rendering his conviction and sentence final. On April 8, 1996, petitioner sought post-conviction relief (PCR) in the state district court, which denied relief on February 24, 1997.[9] Petitioner's application for writs was denied by the Louisiana Fifth Circuit Court of Appeal on May 16, 1997, ***State v. Leeming***, No. 97-KH-370 (La. App. 5th Cir. May 16, 1997) and by the Louisiana Supreme Court on November 7, 1997, ***State v. Leeming***, 703 So.2d 1264 (La. 1997).

On January 4, 1999, petitioner signed[10] his second application for PCR and the trial court denied relief on June 21, 1999. The Louisiana Fifth Circuit Court of Appeal denied petitioner's writ application on September 3, 1999, ***State v. Leeming***, No. 99-KH-934 (La. App. 5th Cir. Sept. 3, 1999). The Louisiana Supreme Court denied writs on April 28, 2000, ***State ex rel. Gregory Leeming v. State of Louisiana***, No. 1999-KH-2998 (La. 2000).

On April 27, 2001, via counsel, Attorney Anespy-Smith, filed a "Motion to Reopen Existing Application for Writ of

---

[8] ***State v. Leeming***, No. 91-58 "B", 24th Judicial District Court, Parish of Jefferson, State of Louisiana..

[9] State Record, Volume 2, Copy of Trial Court's Order and Written Reasons denying petitioner's Application for PCR.

[10] State Record, Supplemental Volume 1, Copy of Petitioner's Second PCR Application.

Habeas Corpus and for leave to File Petition for Writ of Habeas Corpus", on Leeming's behalf.[11] The District Judge granted the motion on May 24, 2001.[12]

Petitioner, via counsel, brings nine grounds for federal *habeas corpus* relief, with sub-parts.

1. Ineffective assistance of counsel due to counsel's:
   a. failure to consult with defendant and insubstantial preparation,
   b. failure to challenge a biased juror;
   c. failure to review and familiarize himself with the evidence;
   d. failure to object to admission and juror viewing of photographs during deliberations; and,
   e. failure to submit jury instructions;

2. State failed to produce ***Brady*** material;
3. Cumulative impact of errors;
4. Failure of trial court to hold an evidentiary hearing on the application of PCR;
5. Denial of Equal Protection and Due Process of Law of the discriminatory prejudicial selection process of the grand jury and the indictment process;
6. Ineffective Assistance of Counsel for counsel's failure to object to the discriminatory grand jury foreman selection process;
7. The indictment was unconstitutional;

---

[11] Fed. Rec. Doc. No. 15.

[12] Fed. Rec. Doc. No. 16. The District Judge also ordered that Leeming's Petition for Writ of Habeas Corpus (Doc. 1) be reopened and that Leeming's original filing date of November 12, 1998, be retained for prescriptive purposes.

8. La. C. Cr. P. art. 413. B created an unconstitutional defect in the indictment and trial process; and,
9. Patent error.

Petitioner also presented the following issues in his original *pro se* application:

10. Conviction and sentence obtained from cumulative effect and prejudice resulting in constitutional violations (Insufficiency of Evidence);
11. Conviction and sentence obtained from an invalid waiver of rights and a self-incriminating confession;
12. Failure to disclose favorable evidence (***Brady***); and,
13. Ineffective assistance of counsel.

The respondent file a timely response and characterized the issues presented as follows:

Petitioner argues that his attorney rendered ineffective assistance at his trial, that the evidence was insufficient to sustain a conviction of second murder, that his confession to the crime was involuntary, that the State failed to disclose favorable evidence, and his conviction was obtained by cumulative constitutional errors.[13]

Review of the record shows that petitioner has exhausted his federal claims in the highest state courts. See ***Rose v. Lundy***, 455 U.S. 509, 102 S. Ct. 1198, 71 L.Ed.2d 379 (1982); ***Dupuy v. Butler***, 837 F.2d 699, 702 (5th Cir. 1988).

The State does not contest the fact that the petition is timely. Additionally, in light of the district court's order, *see* Fed. Rec. Doc. 6, preserving Leeming's original filing date, the court

---

[13] Fed. Rec. Doc. 18, page 5. Study of the response shows that Respondent addressed the ***Campbell*** issue and the claim regarding the responsive verdict on pages 15 thru 17.

believes that the petition must be considered timely. Accordingly, this Court will address the merits of petitioner's claims.

Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") includes a comprehensive overhaul of federal habeas corpus legislation, including Title 28, United States Code, Section 2254. Amend subsections 2254(d)(1) and (2) contain revised standards of review for questions of fact, questions of law and mixed questions of fact and law where there has been an adjudication on merits in State court proceedings.[14]

State court determinations of questions of law and mixed questions of law and fact are reviewed under 28 U.S.C. § 2254(d)(1) and receive deference unless they were "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." ***Hill v. Johnson***, 210 F.3d 481, 485 (5th Cir. 2000), *cert.*

---

[14] Section 2254(d) provides in full:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in the light of evidence presented in the State court proceeding.

denied, –U.S.–, 121 S. Ct. 2001, 149 L.Ed.2d 1004 (2001). The United States Supreme Court has advised that:

> Under the "contrary to" clause, a federal habeas corpus court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a ~~set of~~ materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle to the prisoner's case.

Williams v. Taylor, 529 U.S. 1056, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 3889 (2000); ***Hill***, 210 F.3d at 485. Questions of fact found by the state court are "presumed to be correct...and we will give deference to the state court's decision unless it 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" **Hill**, 210 F. 3d at 485, quoting 28 U.S.C.§ 2254 (d)(2).

Facts[15]

The facts as found by the Louisiana Court of Appeal, Fifth Circuit on Leeming's direct appeal are as follows:

> On December 30, 1990, members of the Jefferson Parish Sheriff's Office responded to a report of a possible homicide at the Candlelight Inn on Airline Highway. Sergeant Kenneth Davis, Deputy Michael Carrone and Detective Steve Kolb were the first three officers to arrive at the scene. Upon their arrival, they met with the

---

[15] This court has verified that the facts are supported by the record.

owner of the motel, who advised them that he noticed some blood on the curtains, and knocked on the door. The defendant opened the door and was placed against the wall by Deputy Carrone. Sergeant Davis entered the room and discovered the bloody body of a woman on the floor. The officers handcuffed the defendant and removed him from the room. At that point the defendant was advised of his constitutional rights and indicated to Deputy Carrone that he fully understood those rights.

Despite the officers' caution to remain silent until detectives arrived, the defendant freely spoke about the murder and his motivation. He told officers that he killed Caroline Alford because he was tired of being "ripped off" by her and that he intended to call the police after the football game he was watching on television was over.

The defendant was taken to police headquarters where he was advised of his rights. He stated that he understood those rights. He read and signed a waiver of rights form and expressed a desire to make a statement.

In that statement the defendant explained that he recently returned to New Orleans from California where he had resided for the past few years. He intended to resume employment as an offshore cook in about one week. He checked into The Candlelight Inn on Christmas day. He was familiar with that establishment and knew several individuals who frequented the place. He stated that he had known Ms. Alford in 1986 before he

moved to California. On the day of the murder the defendant met Ms. Alford at the Poppa Bear Bar in the Candlelight Inn. They went up to his room and engaged in sexual activity. The defendant accused Ms. Alford of stealing $140.00, a shirt and a watch from him a few days earlier. He said he was tried of being "ripped off" so he decided to kill her. He explained in detail how he cut her throat and stabbed her with one of the knives he uses in his profession as a cook. He also stated that she asked him to help her after the stabbing but he told her, "I can't help you no more. It's over."

After she died the defendant cleaned up some of the blood with towels in the room and changed his clothes. He then went out to the store to purchase a 12-pack of beer. He returned to his room and drank two of the beers and began watching a football game. He remained in his room until officers arrived.

When they asked why they committed the murder, the defendant stated that he was angry with Ms. Alford for stealing from him and he wanted to "prove a point" to prostitutes who steal and do cocaine.

On appeal defendant assigns four errors. The first two center around the affirmative defense of intoxication. Specifically, defendant argues that his level of intoxication prevented him from forming the requisite intent for second degree murder and from giving a knowing and voluntary confession.

State v. Leeming, 612 So.2d 308, 309-310 (La. App. 5th Cir. 1992).

The state appellate court then discussed the following testimony regarding the level of Leeming's intoxication, much of which was offered at the motion to suppress confession hearing:

> Deputy Carrone who was one of the first officers on the scene of the murder testified to the events as previously stated in this opinion and further testified that, none of the officers threatened or promised the defendant anything for the waiver of his rights. Deputy Carrone stated that the defendant appeared to offer his statement knowingly, freely and voluntarily.
>
> On cross-examination, Carrone testified that defendant appeared healthy and normal. In addition, defendant did not smell of alcohol, although he did ask for a beer once he was removed from the room. According to Carrone, defendant did not stumble when he walked. He appeared to be very casual and relaxed and exhibited no traits of aggression or hostility. The officer further testified that while on the scene, defendant started to tell him what had happened; however, the officer advised defendant to wait until the detectives arrived to talk to them.
>
> In the last portion of his testimony, Carrone testified that defendant did not exhibit any traits of a person who was intoxicated and that defendant was oriented as to date and place. However, the officer admitted that no breath or blood testing was performed to ascertain defendant's alcohol level.

Lieutenant Steve Buras, commander of the homicide division of the Jefferson Parish Sheriff's Office, testified that on December 30, 1990, at approximately 1:00 p.m., he responded to a call from the Candlelight Inn. upon his arrival on the scene, he was informed by other deputies that the suspect in the killing had made some admissions. Lieutenant Buras then instructed the officers to transport defendant to First District Lock-up. After reviewing the scene, Buras proceeded to the station and conducted an interview with defendant. Prior to conducting the interview, Lieutenant Buras advised defendant of his rights, and then let defendant read the rights himself. Defendant signed his initials, acknowledging that he read each right and then signed the waiver of rights form. Defendant subsequently gave the officer a taped statement which was later transcribed. According to Buras, defendant did not appear intoxicated and seemed to understand his rights.

On cross-examination, Buras testified that when he initially met defendant at the station, defendant advised Buras that he remembered giving statements to the deputies on the scene and thought it would be in his best interest to provide the officers with a detailed statement of what had taken place. When defense counsel questioned Buras about his knowledge of defendant's alcohol consumption, the officer testified that the only comment made to him was that defendant had two beers after the killing. Buras admitted that he did not order any tests to determine the alcohol content in defendant's blood.

Detective Steve Kolb also testified. He confirmed Deputy Carrone's recitation of the fact surrounding the murder investigation. Detective Kolb testified that the defendant appeared to be orientated as to time and place and did not appear drunk; although Detective Kolb admitted on cross-examination that he smelled alcohol when the defendant spoke to him.

Sergeant Kenneth Davis testified that he proceeded tot he crime scene after being advised by a radio supervisor that she received a call from a man out of state who told her that his brother had just murdered someone. sergeant Davis was present when defendant's motel room was entered. According to Davis, defendant did not give the officers any trouble, and in fact, was fully dressed watching a football game. Although Davis could not say whether he smelled alcohol on defendant, he noticed that there were some beercans in the room. The officer described defendant's demeanor as "very cold". He also testified that defendant was talkative but calm and appeared to know what he was doing at all times.

After considering the testimony presented, the trial court concluded that defendant was properly advised of his constitutional rights and that he made a knowing and voluntary waiver of those rights. Accordingly, the court denied the motion to suppress.

During the course of the trial, defense counsel re-urged his motion to suppress which was again

denied. This was based upon the discovery that when booked at the police station, less than half an hour before the taking of the defendant's statement, the booking officer noted that the suspect appeared to be under the influence of alcohol...

At trial Sergeant Davis, Deputy Carrone and Detective Kolb testified for the state. All three officers were present at the scene of the murder. They all agreed that the defendant did not appear to be intoxicated. He was not stumbling, glassy-eyed or confused. His speech was not slurred and he was oriented as to time and place. He gave officers a detailed account of the murder as well as events before and after the murder. They also agreed that the defendant did not tell officers that he was intoxicated; although, he did ask for a beer. Detective Kolb admitted he smelled a faint odor of alcohol. The other two officers testified that they did not smell alcohol.

Lieutenant Buras arrived at the scene later and took defendant's statement after he had been transported to the First District Police Station in Jefferson Parish. Detective Kolb was present when Lieutenant Buras read and explained defendant's rights. Lieutenant Buras stated that the defendant did not appear intoxicated and seemed to understand the rights form after reading it.

The defense offered testimony from various medical professionals to show the defendant is an alcoholic. He is also described as a borderline

personality insofar as he uses alcohol as a way to medicate his feelings of anxiety, mistrust of others, depression and low self-esteem.

Tracy Hall, a bartender at the Poppa Bear Bar, testified that the defendant came into the bar on the night of the murder at about 10:00 p.m. The defendant was drinking. He originally had a glass of milk, then a beer and later several shots of vodka. Hall stated that during the course of the evening the defendant played the jukebox and danced. At about 4:00 or 3:30 a.m. the victim came into the bar and ordered a vodka on the rocks. The defendant paid for her drink and purchased one for himself. The defendant and the victim sat together and engaged in what appeared to be a normal conversation. Hall noticed about thirty minutes later that both the defendant and the victim had left the bar, but he could not be sure if they left together.

Hall described defendant's condition as a "buzz". He testified that it was his policy not to serve alcohol to someone who is drunk. Hall said that, although the defendant "had a buzz on", he would be served because he was not driving. Further, Hall testified that the defendant was capable of walking to the jukebox. He was not stumbling. He was able to count out the correct amount of money to pay the bartender.

Id. at pp. 310-311, 313-314.

Insufficiency of the Evidence
(Claim No. 10)

Petitioner claims that the evidence adduced at trial was insufficient to support the jury's guilty verdict. Leeming argues that there was extensive evidence that he was extremely intoxicated at the time the offense, thus rendering it impossible for him to have the specific intent[16] required to be convicted of second degree murder.

When conducting a post-AEDPA sufficiency of the evidence review, a federal court may grant relief only if it determines that the state court decision rested on an "unreasonable application" of clearly established federal law, as determined by the Supreme Court, to the facts of the case. *See* Title 28, United States Code, Section 2254(d)(1). The "clearly established" federal law was enunciated by the Supreme Court in ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The ***Jackson*** Court held that a claim of insufficient evidence would lie if, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not have found the essential elements of the crime proven beyond a reasonable doubt. ***Id.***

In rejecting petitioner's insufficient evidence claim, the Louisiana Fifth Circuit offered the following analysis:

> As to defendant's argument that his degree of intoxication precluded him from forming the requisite intent to commit second degree murder we note that LSA-R.S. 14:30.1 A(1) defines the

---

[16] Specific criminal intent is defined as "the sate of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1).

offense as the killing of a human being "when the offender has a specific intent to kill or to inflict great bodily harm."

Specific intent exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. LSA-R.S. 14:10(1). Specific intent is a state of mind and, as such, need not be proven as a fact but may be inferred from the circumstances and actions of the accused. ***State v. Graham***, 420 So.2d 1126 (La.1982); ***State v. Edge***, 504 So.2d 1169 (La.App. 5th Cir.1987), writ denied, 507 So.2d 226 (La.1987). The determination of whether the requisite intent is present in a criminal case is for the trier of fact, and a review of the correctness of this determination is to be guided by the ***Jackson*** standard. ***State v. Huizar***, 414 So.2d 741 (La.1982).

Voluntary intoxication can be material when the circumstances indicate that the intoxication precluded the presence of a specific criminal intent. LSA-R.S. 14:15. Intoxication is in the nature of an affirmative defense to a criminal charge and the burden is upon the defendant to prove the existence of that condition at the time of the offense. Whether voluntary intoxication in a particular case is sufficient to preclude specific intent is a question to be resolved by the trier of fact. ***State v. Freeman***, 517 So.2d 390 (La.App. 5th Cir.1987).
Leeming, 612 So.2d at 313.

After thoroughly reviewing the trial testimony,[17] the Louisiana Fifth Circuit said:

> Given the testimony regarding the events prior to and subsequent to the murder we cannot say the jury, as triers of fact, were irrational in rejecting defendant's argument that he was too intoxicated to form the specific intent for second degree murder. ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This assignment lacks merit.
> ***Leeming***, 612 So.2d at 314.

Applying the ***Jackson*** standard, this Court must deny petitioner's challenge. The jury heard and weighed all the evidence submitted at trial, this court finds that a rational juror could have found the essential elements of second degree murder beyond a reasonable doubt. Petitioner cannot prevail on his insufficiency of the evidence claim as the state court's analysis

---

[17] The Fifth Circuit reviewed the trial testimony of Sergeant Davis, Deputy Carrone and Detective Kolb, who were all present at the scene of the murder, who all stated that Leeming did not appear to be intoxicated. Detective Kolb said he smelled a faint odor of alcohol. Lieutenant Buras said the Leeming did not appear to be intoxicated and seemed to understand the rights form. The Fifth Circuit specifically reviewed the testimony of defense medical professionals who testified regarding Leeming being an alcoholic and who described Leeming as a borderline personality because of his use of alcohol. The testimony of the bartender, Tracy Hall, was also reviewed relative to Leeming's actions and physical condition. *See* ***Leeming***, 612 So.2d at 313-314.

was a reasonable application of ***Jackson*** facts of this case.[18]

Brady Violation
(Claims Nos. 2 and 12)

Petitioner claims that the State suppressed a health screening form completed by intake officers at the Jefferson Parish Correctional Facility, on the night of his arrest. The form indicated that petitioner appeared to be "under the influence", and that petitioner was an intoxicated alcoholic. Petitioner claims that the form was completed twenty-two minutes before he confessed. Moreover, petitioner argues that the form was not produced by the State until halfway through the trial. and after his confession had been presented to the jury. Petitioner claims that but for the failure to produce the form, the outcome of his case would have been different.

Since, the passage of the AEDPA, a federal habeas court may grant a writ of *habeas corpus* on mixed question of law and fact, such as whether or not evidence was unconstitutionally suppressed, *see* ***Trevino v. Johnson***, 168 F.3d 173, 184 (5th Cir.), *cert. denied*, 527 U.S. 1056, 120 S. Ct. 22, 144 L.Ed. 2d 825 (1999), only if it determines that the state court decision rested on an "unreasonable application" of clearly established Federal law, as determined by the Supreme Court, to the facts of the case. Title 28, United States Code, Section 2254 (d)(1). As the U.S. Supreme Court has stated, "[t]he term 'unreasonable' is no doubt

---

[18] The record establishes that the evidence was overwhelming. Further, petitioner was found at the scene with the body of the victim and he admitted killing the victim. To the extent that petitioner argues that if he was guilty of anything, it should have been manslaughter, the record shows that the jury was duly charged regarding responsive verdicts which included manslaughter. Review of the record supports the jury's verdict.

difficult to define." ***Williams v. Taylor***, 529 U.S. 362, 120 S.Ct. 1495, 1522, 146 L.Ed.2d 389 (2000). However, the Court has instructed that "[u]nder Section 2254(d)(1)'s 'unreasonable application' clause...a federal habeas court may not issue the writ simply because that court concludes in its *independent* judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." ***Id.*** (emphasis added).

"[S]uppression of evidence favorable to the accused violates the Due Process Clause if the evidence is material either guilt or to punishment. ***Kopycinski v. Scott***, 64 F.3d 223, 225 (5th Cir. 1995), citing ***Brady v. Maryland***, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963). Under ***Brady*** and its progeny, the prosecution is required to disclose to the defense both exculpatory evidence and evidence that would be useful for impeachment. ***Brady***, 373 U.S. at 87, 83 S.Ct. at 1196; ***Giglio v. United States***, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); ***United States v. Bagley***, 473 U.S. 667, 675-76, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). Thus, to prove a constitutional violation as contemplated under ***Brady***, there must be a suppression of evidence which is both favorable to the accused and material to his or her guilt or punishment.

The trial court specifically addressed this issue in its February 24, 1997, Order denying petitioner's application for PCR as follows:

> In his first claim for relief, defendant alleges that the State suppressed ***Brady*** material at his trial. The record reflects that the alleged ***Brady*** information was in the possession of the defendant at trial, and was in fact brought to the attention of the jury and the trial judge. Defendant, therefore, has not established the materiality element of ***Brady***. ***Kyles v. Whitley***,

> 115 S.Ct. 1555 (1995); ***United States v. Bagley***, 105 S.Ct. 3375 (1985). This claim was also rejected implicitly when the court of appeal affirmed the denial of the motion to suppress. ***State v. Leeming***, 612 So.2d 308 (La.App. 5th Cir. 1992). The alleged ***Brady*** claim, therefore, cannot be considered on post conviction. La.C.Cr.P. art. 930.4.

State record, Volume 2, ***State v. Leeming***, No. 91-58, Order dated February 24, 1997.

The state correctly points out that the defense received the information during trial and fully explored the language on the form and introduced the form for the jury's review.[19] The record shows that the ***Brady*** material was revealed and that it was productively used by the defense during the trial. Petitioner has failed to prove that, but for the late production of ***Brady*** evidence, the outcome of his trial would have been different. Petitioner is not entitled to relief on this claim.

Involuntary Confession
(Claim No. 11)

Petitioner claims that his conviction and sentence were the result of an illegal and involuntary confession because he was intoxicated from a drinking binge when he told the police how and why he killed the victim. Petitioner claims that his constitutional rights, as articulated in ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), were violated.

Whether a confession is voluntary depends upon the "totality of the circumstances," including "the crucial element of

---

[19] Fed. Rec., Doc. No. 18, Memorandum in Opposition to Application for Habeas Corpus, page 14.

police coercion," "the length of the interrogation" and "its continuity." "the defendant's maturity," "education," "physical condition," and "mental health'" and "the failure of the police to advise the defendant of his rights to remain silent and to have counsel present during the custodial interrogation." ***Withrow v. Williams***, 507 U.S. 680, 693-94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). Petitioner's claim focuses solely on his physical condition and mental health due to his alleged intoxication.

A challenge to the voluntariness of a confession is a mixed question of law and fact. ***Williams v. Maggio***, 727 F.2d 1387, 1390 (5th Cir. 1984). To prevail on his federal *habeas* claim, petitioner must show that the State court's determination that petitioner's confession was constitutional was "contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." ***Hill v. Johnson***, 210 F.3d at 485.

In this case, the Louisiana Fifth Circuit Court of Appeal, applying the relevant Supreme Court law as set forth in ***Miranda***, found that petitioner Leeming had been advised of his ***Miranda*** rights and that Leeming's confession was freely and voluntarily given. Specifically, the Louisiana Fifth Circuit said, in pertinent part:

> Before a confession can be introduced into evidence, the State has the burden of proving that it was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises. LSA-C.Cr.P. art 703 (D); LSA-R.S. 15:451; ***State v. Vaccaro***, 411 So.2d 415 (La. 1982). It must also be established that an accused who makes a confession during a custodial interrogation was first advised of his constitutional rights as per ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and voluntarily and intelligently waived those rights.

...(citations and footnotes omitted.)

> In ***State v. Robinson***, 384 So.2d 332 (La. 1980), the Louisiana Supreme Court set forth the law regarding an inculpatory response or confession which has been challenged on the ground that the accused was intoxicated at the time of interrogation. In ***Robinson***, the Louisiana Supreme Court states at p. 335 as follows:
>
> Where the free and voluntary nature of a confession is challenged on the ground that the accused was intoxicated at the time of interrogation, the confession will be rendered inadmissable only when the intoxication is of such a degree as to negate defendant's comprehension and to render him unconscious of the consequences of what he is saying. Whether intoxication exists and is of a degree sufficient to vitiate the voluntariness of the confession are questions are fact. ***State v. Rankin***, 357 So.2d 803 (La. 1978).
> ***Leeming***, 612 So.2d at 311-312.

The Louisiana Fifth Circuit reviewed the testimony rendered during the motion to suppress[20] and concluded that Leeming was properly advised of his constitutional rights and that he made a knowing and voluntary waiver of those rights.

Finally, the Louisiana Fifth Circuit considered the totality of the evidence presented and said:

---

[20] See pages 11 thru 14 of this Report and recommendation; ***Leeming***, 612 So.2d at 310-311.

In the present case, the issue of the voluntariness of the confession and the degree of defendant's intoxication turns on the credibility of the witnesses. The testimony of Officers Buras and Kolb, who were present during the statement, show that defendant was advised of his constitutional rights, seemed to understand those rights, and then chose to waive them. According to the officers, no one threatened defendant or promised him anything in exchanged for the statement. Moreover, the officers testified that defendant did not appear to be intoxicated either at the scene of the arrest or at the time of the taking of his statement, that defendant appeared to be lucid, and that defendant was oriented as to time and place.

In addition, defendant, at the beginning of the taped statement, acknowledged that he was advised of his rights and chose voluntarily to give a statement to police. In defendant's statement, he was able to describe the events that took place, the time frame surrounding those events, how he killed the victim with a knife, and how many times he stabbed her. Defendant also described his reasons for killing her. Defendant further stated that he knew he would have to do some time for the murder, and that he planned to call the police after the football game. In his statement, defendant told the officers that although he was an alcoholic, he was not "under the influence" of alcohol at the time of the statement. He told officers that he had two beers that morning.

> The fact that defendant was not intoxicated during this time frame is further supported by the evidence that after the killing, he was able to shower, change his clothes and clean up some of the blood in the room. Further, he was able to go to the store to buy some beer and a newspaper.
>
> Although Michael Murphy, the booking officer, testified at trial that defendant appeared to be under the influence at the time he was brought in, he did not note, in the appropriate subcategories, that defendant was confused or unconscious, nor did he note that defendant staggered or had slurred speech.
>
> Despite some of the testimony at trial that defendant may have been intoxicated at the time of the crime and at the time of the taped statement, there was an abundance of contrary evidence. Since this issue involves a credibility call, we cannot say that the trial judge abused his discretion in denying defendant's motion to suppress.
>
> This assignment is meritless.
> ***Leeming***, 612 So.2d at 312-313.

The jury heard the trial testimony, and specifically heard the testimony of the booking officer. The copy of the booking sheet was introduced into evidence at trial in support of Leeming's defense of intoxification. The *habeas corpus* statute obliges federal judges to respect to respect credibility determinations made by the trier of fact. ***Pemberton v. Collins***, 991F.2d 596 (1993), citing ***Sumner v. Mata***, 455 U.S. 591, 597, 102 S.Ct. 1303, 1306, 71 L.Ed.2d 480 (1982).

Accepting the facts and credibility determinations made by the trier of fact, having found them well supported by the record by the record, this Court also finds that petitioners' claim that his confession was involuntary and obtained in violation of his ***Miranda*** rights because he was intoxicated is meritless.

Ineffective Assistance of Counsel
(Claims Nos. 1 and 13)

Petitioner claims that he suffered ineffective assistance of counsel.[21] A claim of ineffective assistance of counsel is a mixed question of law and fact. ***Boyle v. Johnson***, 93 F.3d 180, 187 (5th Cir. 1996), *cert. denied,* 519 U.S. 1120, 117 S.Ct. 968, 136 L.Ed.2d 853 (1997). As such, under the AEDPA, this Court may grant habeas relief only upon a determination that the state court decision rested upon an unreasonable application of clearly established Supreme Court law to the facts of the case.

The applicable law was enunciated by the Supreme Court in ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). Under ***Strickland***, petitioner must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. If the court finds that the petitioner has made an insufficient showing as to either one of the two prongs of inquiry, it may dispose of the claim without addressing the other prong. ***Strickland***, 466 U.S. at 697.

Under the deficient performance prong of the ***Strickland*** test, "it is necessary to 'judge...counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" ***Lockhart v. Fretwell***, 506 U.S. 364, 371, 113 S.Ct. 838, 844(1993), citing ***Strickland***, 466 U.S. at 690. "An attorney's performance, which enjoys a strong presumption of

---

[21] Petitioner was represented by Attorney Mark Nolting during pre-trial and at trial State Rec., Volume 1, page 152.

adequacy is deficient if it is objectively unreasonable." ***United States v. Walker***, 68 F.3d 931, 934 (5th Cir. 1995), quoting ***United States v. Acklen***, 47 F.3d 739, 742 (5th Cir. 1995). Analysis of counsel's performance must take into account the reasonableness of counsel's actions in light of all the circumstances. ***Strickland***, 466 U.S. at 688-89. Petitioner "caries the burden of proof...and must overcome a strong presumption that the conduct of his trial counsel falls within a wide range of professional assistance." ***Crockett v. McCotter***, 796 F.2d 787, 791 (5th Cir. 1986).

To prove prejudice under the ***Strickland*** standard, petitioner "must show that there is a reasonable probability as a "probability sufficient to undermine confidence in the outcome." ***Id.*** In making a determination as to whether prejudice occurred, courts must review the record to determine the "relative role that the alleged trial errors played in the total context of the trial." ***Crockett***, 796 F.2d at 793.

Petitioner claims that his constitutional rights were violated because his counsel failed to prepare and consult with him; failed to challenge a biased juror; failed to review and familiarize himself with the evidence; failed to object to the admission of certain photographs and to the jury's request to review the photographs during their deliberations; and, failed to submit jury instructions.

Preparation, Consultation, Review and Familiarization Concerning the Evidence

Review and study of the state court record shows that petitioner's trial attorney, Mark D. Nolting, Esquire, filed the following pre-trial and post-trial motions on behalf of petitioner.[22]

---

[22] On December 11, 1991, the District Judge granted Leeming's Motion to Enroll (Robert Toale, Esquire) as Co-Counsel of Record.

1. Motion for Production of Initial Police Report (State Record , Volume 1, pp. 20-21);

2. Motion to Suppress Confession, Identification and Physical Evidence (State Record, Volume 1, pp. 22-23);

3. Motion to Appoint Sanity Commission (State Record, Volume 1, pp. 22-23);

4. Request and Motion for Discovery and Inspection and for a Bill of Particulars for a Charge of Murder Two (State Record, Volume 1, pp. 25-52);

5. Motion of Plea under La. C.Cr.P.Art 561 (State Record, Volume 1, p. 60);

6. Ex Parte Motion for Psychiatric, Psychological and Sociological Examinations and Funds and Experts Necessary Therefore (State record, Volume 1, pp. 61-64);

7. Motion for Discovery of R.A.P. Sheets and Juvenile Records of Victim and Witnesses (State Record, Volume 1, p.81, p.112);

8. Defense Notice Pursuant to C.Cr. P. Art. 726 (State Record, Volume 1, p. 82 and p. 102);

9. Motion for Allocation of Funds for Defense Expert (Private Investigator) State Record, Volume 1, pp. 83-84;

10. Motion for Psychiatric Examination and Funds

Therefore (State Record, Volume 1, pp. 85-88);

11. Supplemental Motion for Production of Evidence (State Record, Volume 1, p. 90); (The motion was for tape recorded statements of Leeming and for copies of all photographs in connection with the case);

12. Motion for Continuance (Trial)(Counsel's reasons were to complete discovery to conduct investigation and to secure experts);

13. Ex Parte Motion for Psychiatric Examination and Funds Therefore (State Record, Volume 1, pp. 94-96; 106-108);

14. Motion for Supplemental Bill of Particulars (State Record, Volume 1, pp. 97-99);

15. Motion for Discovery of Prior Statements of Witnesses (for ***Brady*** and Impeachment Material) (State Record, Volume 1, p. 100);

16. Motion for Production of Transcript (Regarding Hearing of Suppression of Confession) (State Record, Volume 1, p. 101):

17. Amended Motion for Supplemental Bill of Particulars (State Record, Volume 1, pp. 103-105);

18. Motion for New Trial (State Record, Volume 1, pp. 117-120).

Review of the record does not support petitioner's claim that his attorney failed to prepare for trial. Moreover,

petitioner's claim that his attorney did not inspect the prosecutor's file was resolved by the trial judge, Honorable Ernest V. Richards, IV, on August 13, 1991, during hearings on pre-trial motions.[23] Specifically, after inquiring relative to the questions of production and inspection of evidence and witnesses, the trial judge concluded that open file discovery had occurred. (State Record, Volume 1, p. 165.).

Petitioner's claim of failure of his counsel to communicate with him is also unfounded. Particularly noted is Attorney Nolting's request that the court allow Leeming to be "brought over to assist me at counsel table" during the pre-trial motion(s) hearings. (State Record, Volume 1, p. 155.) Counsel's request is inconsistent with petitioner's claim of lack of communication with his attorney.

Petitioner also complains that his attorney was ineffective because he failed to call available defense witnesses to testify and that he failed to subpoena other defense witnesses. Review of the record shows and suggests that the decision relative to calling or not calling of defense witnesses was a matter of trial strategy and tactics.

There is nothing in the record which supports petitioner's claim that his attorney refused to allow petitioner to testify at the motion to suppress hearing. Review of the record shows that petitioner was silent regarding asserting his right to testify or not to testify at the morion to suppress hearing.

The record shows that Leeming testified extensively during his jury trial.[24] Prior to his trial testimony, the court advised Leeming concerning his right not to incriminate himself

---

[23] State Record, Volume 1, pp. 153-165, Transcript of Preliminary Matters and Motion to Suppress Evidence.

[24] State Record, Supplemental Volumes 7 of 9, 8 of 9 and 9 of 9, pages 1737-1750; 1751-1842; 1873-2000; and, 2007-2052.

and his right to make the decision as to whether to testify or not.[25] Leeming waived his Fifth Amendment rights and decided to testify.[26] Petitioner was not prejudiced because of his agreement or acquiescence to the tactical decisions regarding his defense.[27]

Leeming complains regarding the failure of his counsel to subpoena and call four bartenders (Tracy Hall, Kathy, Carol, and Audrey) to testify regarding his alleged alcoholic condition. Leeming fails to mention that his attorney called Mrs. Della Maxine Bonbrake, one of the owner's of the Poppa Bear's Bar,[28] to testify regarding her knowledge of Leeming and the instructions that she gave her bartenders regarding serving patrons who appeared drunk. She said if "they are drunk don't serve them."[29] Review of Mrs. Bonbrake's testimony fails to show that she nor any of her four mentioned bartenders had any information regarding Leeming's alleged five day drinking binge. As mentioned earlier, Tracy Hall, a bartender, gave testimony concerning Leeming's physical condition. Moreover, review of the record shows that petitioner has failed to prove that he was prejudiced because of his trial attorney's decisions regarding his defense and the use of witnesses.

It is well-established that the failure to contact witnesses

---

[25] State Record, Supplemental Volume 7 of 9, pages 1738-1739.

[26] State Record, Supplemental Volume 7 of 9, page 1740.

[27] State Record, Supplemental Volume 7 of 9, pages 1557, 1558, and 1581. Tracy Hall testified at trial. See pages 15 and 16 of this Report.

[28] State Record, Supplemental Volume 7 of 9, pages 1738-1739.

[29] State Record, Supplemental Volume 7 of 9, page 1580.

is not *per se* prejudicial to the point of warranting habeas relief. *See* ***Buckelew v. United States***, 575 R.2d 515. 521 (5th Cir. 1978) ("complaints of uncalled witnesses are not favored, [in federal habeas review] because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative"). In ***Alexander v. McCotter***, 775 F.2d 595, 602 (5th Cir. 1985), the Fifth Circuit noted that for a petitioner to show prejudice under ***Strickland***, he must show that the testimony of the witnesses would have been favorable and that the witnesses would have testified at trial. Petitioner must show a reasonable probability that the uncalled witnesses would have made a difference in the result. ***Alexander***, 775 F.2d at 603. There is a strong presumption that the failure of petitioner's counsel to call witnesses is a strategic choice. ***Strickland***, 466 U.S. at 689-90, 104 S.Ct. At 2065-66 (1984).

In this case, petitioner has clearly failed to carry his heavy burden of proving counsel was ineffective in deciding which witnesses should be called at trial.

Biased Juror

Petitioner claims that his trial attorney was ineffective because he failed to challenge Juror Number 2, Mrs. Payton,[30] who testified during voir dire examination regarding the law and intoxication:

MR. NOLTING:

Mrs. Payton, you're an R.N., right?

MRS. PAYTON:

That's right.

MR. NOLTING:

---

[30] State Record, Supplemental Volume 3 of 9, pages 588-593 and 617.

You've been to school, and have learned a great deal I presume, about alcohol, and drugs, and the effect on the body, is that true?

MRS. PAYTON:

That's true.

MR. NOLTING:

Now you think that you can follow the law as it's written by the State Legislature?

MRS. PAYTON:

I'd have problems with that.[31]

After discussing the law concerning specific intent and voluntary intoxication, Mrs. Payton replied to the trial judge's and counsel's questions:

THE COURT:

You're confident that you could follow the law, regardless of what your personal opinions might be?

MRS. PAYTON:

Yes, I would try to put that aside and go on the evidence, the weight.

MR. NOLTING:

Now you said you could try to do that, but in trying to do it, is it more than likely than not that your feelings will prevent you from accurately weighing the evidence that's there?

MRS. PAYTON:

I'd say more than likely.

MR. NOLTING:

More than likely what?

MRS. PAYTON:

---

[31] State Record, Supplemental Volume 3 of 9, page 588.

That it may hinder me. But I would want to go with the law, but I'm not sure I could.

MR. NOLTING:

You're saying more than likely it would effect you?

MRS. PAYTON:

It probably would.[32]

Review of the record shows that Leeming's attorney's acceptance of Mrs. Payton as a juror was trial strategy as he was allowed to explore her potential to fairly try the case and to follow the law. This claim is meritless.

Admission and Review of Photographs

Petitioner claims that his counsel was ineffective because he failed to object to the admission of and the viewing, during deliberations, of forty photographs, the probative value of which, he claims, was outweighed by the prejudicial effect. Moreover, petitioner claims that the photographs were gruesome and cumulative.

Respondent contends that the photographs had previously been properly admitted into evidence and that there was no legal reason for the trial judge to deny the jury's request to view the photographs again. Counsel cannot be said to have been ineffective because he did not object to the jury's viewing of legally admitted evidence.

In addition, federal habeas reviews the admissibility of evidence, under state law. ***Jernigan v. Collins***, 980 F.2d 292, 298 (5th Cir. 1992), *cert. denied*, 508 U.S. 978, 113 S.Ct. 2977,

---

[32] State Record, Supplemental Volume 3 of 9, pages 592-593.

125 L.Ed.2d 675 (1993). Such review is proper only to determine whether a state trial judge's error is so extreme as to "render the trial fundamentally unfair or violate an explicit constitutional right." ***Peters v. Whitely***, 942 F.2d 937, 940 (5th Cir. 1991), *cert. denied,* 502 U.S. 1113, 112 S.Ct 1220, 117 L.Ed 457 (1992). In determining whether there has been a denial of fundamental fairness, the Fifth Circuit has stated that the erroneous admission of prejudicial evidence justifies federal *habeas corpus* relief only if it is "material in the sense of a crucial, critical, highly significant factor." ***Givens v. Cockrell***, –F.3d–,2001 WL 102957 (5th Cir. 1977), citing ***Anderson v. Maggio***, 555 F.2d 447, 451 (5th Cir. 1977). In the light of the overwhelming evidence of petitioner's guilt, petitioner has not established that the admission of the photographs was so fundamentally unfair as to constitute a denial of due process. This claim is meritless.

Jury Instructions

Petitioner claims that his attorney was ineffective because he failed to prepare and to submit certain jury instructions. Specifically, petitioner maintains that two jury instructions should have been submitted and read to the jury: One informing the jury of the legal consequences for the defendant of a finding of not guilty by reason of insanity; and, a second instruction concerning the weight to be given to a confession relative to guilt or innocence depending upon the voluntariness of that confession.[33]

The respondent argues that petitioner cannot show prejudice due to counsel's failure to file a proposed written jury instruction regarding insanity as there was no evidence introduced during the trial establishing insanity at the time of the offense. Respondent also argues that counsel was not ineffective in failing

---

[33] Fed. Rec., Doc. No. 15, Attachment, Petitioner for Habeas Corpus, page 6, paragraph No. 5.

to submit a proposed written jury instruction on the voluntariness and admissibility of the defendant's confession to have been voluntary and admissible at the suppression hearing.

Review of the record establishes that the trial judge conducted a charge conference and discussed the proposed jury interrogatories with counsel. Objections were ruled upon.[34] Petitioner's counsel filed at least seven written proposed jury charge requests.[35] The record does not show that counsel filed the jury instructions that petitioner now argues should have been filed. The Louisiana Fifth Circuit Court of Appeal addressed the issue regarding a petitioner's claim that the trial court should have included within its charge an explanation of the consequences of a verdict of not guilty by reason of insanity. The Fifth Circuit said, in pertinent part:

> At a bench conference prior to closing arguments the trial court reviewed the proposed jury charges with counsel. Defense counsel made an oral request at the time that the charge include those articles of the Code of Criminal Procedure which pertain to the disposition of a defendant found guilty by reason of insanity. The trial court denied the request because it was not presented to the court in writing prior to argument.
>
> LSA-C.Cr.P. art. 803 provides that "when a defendant has specially pleaded insanity in accordance with article 552, the court shall charge the jury with respect to the law applicable

---

[34] State Record Supplemental, Volume 9 of 9, pages 2054-2072.

[35] State Record Supplemental, Volume 9 of 9, page 2068.

thereto."
State v. Leeming, 612 So.2d at 314

...

The Fifth Circuit then reviewed the trial court's jury instructions regarding the law on insanity. Thereafter, the Court said:

> Instruction explaining the consequences of a verdict of not guilty by reason of insanity must be given if requested by defendant or jurors. ***State*** *v.* ***Babin***, 319 So.2d 367 (La. 1975), *appeal after remand,* 336 So.2d 780 (La. 1976).
>
> In the present case since the instructions requested by defendant were not included within the court's general charge, defense counsel, pursuant to LSA-C.Cr.P. art. 807, could have specifically written charges for the jury before argument. Defendant did not submit such charges in writing. It has been held that when a special jury charge is not reduced to writing for presentation to the court, a trial judge may properly refuse to give such a charge. ***State v. Weems***, 358 So.2d 285 (La. 1978).
>
> Even assuming the trial judge erred in failing to give special requested charges, it has been held that failure to file a requested charge constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial violation of a constitutional or statutory right. ***State v. Pettaway***, 450 So.2d 1345 (La. App. 2nd Cir. 1984), *writ denied*, 456 So.2d 171 (La. 1984). Given the over-whelming evidence which supports defendant's guilt including his specific

> intent to kill or inflict great bodily harm, we do not find that the failure to give the requested charges prejudiced the defendant.
> ***State v. Leeming***, 612 So.2d at 315.

Although petitioner's counsel was entitled to file the requested jury charges under state law since insanity had been specifically pled as a defense, petitioner fails to establish that counsel's failure to file the charges were prejudicial in light of the evidence offered at trial.

Denial of Equal Protection and Due Process of Law Regarding Discrimination In Selection of Grand Jury and Grand Jury Foreman (Claims Nos. 5, 6, 7 and 8

Petitioner claims that a racially discriminatory selection process, which process excluded African-Americans, women, and other non-Caucasians from being chosen as grand jury foreman, resulted in an unconstitutionally composed grand jury under which the trustworthiness, reliability, and confidence of its decision to indict, deprived him of the fundamental fairness required by law and justice.

Leeming also claims that a racially discriminatory selection process, which process excluded African-Americans, women and other non-Caucasians from being chosen as grand jury foreman, resulted in a violation of the excluded juror's right to equal protection under the law. Additionally, Leeming argues that as it existed at the time of his indictment, La.C.Cr.P.Art. 413.B (amended July 1999) was unconstitutional as it violated procedural due process by authorizing a procedure that allowed grand jurors to be hand picked by district judges in a discriminatory manner. Leeming's position it that racial discrimination in the process of selecting grand jury foremen produced a structural defect in the charging process which is

flawed by prejudice, thereby, producing a constitutionally defective indictment. Moreover, Leeming argues that his attorney was ineffective because he failed to object to or raise the above issues in a motion to quash the indictment.[36] Finally, petitioner brings his claims based on the case of ***Campbell v. Louisiana***, 523 U.S. 393, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998), a case decided after petitioner's conviction became final.

In ***Campbell***, the United States Supreme Court recognized for the first time the standing rights of a white defendant[37] to challenge the exclusion of blacks from the grand jury which indicted him. It was held that a white defendant had standing to raise an equal protection challenge to discrimination against black citizens in the selection of the grand jury foreman and his standing to raise his own due process challenge.

The state district court addressed petitioner's ***Campbell*** claim and his related claim of ineffective assistance of counsel in it's Order of June 21, 1999, denying relief. The court stated, in pertinent part:

> Code of Criminal Procedure article 533 provides that objections to the grand jury are addressed by a motion to quash the indictment. Under Code of Criminal Procedure Art. 535(C), a motion to quash on the grounds asserted by the defendant must be filed in conformity with Code of Criminal Procedure Art. 521, which in turn provides it must be raise by pretrial motion. A motion to

---

[36] Fed. Rec. No. 15, Attachment to Motion to Reopen; Petition, pages 7-8. Also see Memorandum, page 12.

[37] Petitioner claims that his race is white. State Record Supplemental Volume 1 of 1, Memorandum of Law in Support of Post-Conviction Relief; also see State Record Supplemental, Volume 7 of 9, Trial Transcript page 1700.

quash must be filed timely or it is deemed waived. ***State v. Rose***, app. 5th Cir. 1998, 97-943 (La.App.5th Cir. 1/27/98), 708 So.2d 1093. In ***State v. Campbell***, 95-0824 La. 10/25/95, 661 So.2d 1321, reh. denied. Nov. 3, 1995; ***Campbell v. Louisiana***,___ U.S. ___, 118 S.Ct. 1419, 1998 WL 183583 (U.S.), the defendant had filed a motion to quash prior to trial.

Turning to the second issue, ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), provides the test for ineffective assistance of counsel. In order for a claim of ineffective assistance of counsel to prevail, the petitioner must show the counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense in that the errors were so serious as to deprive petitioner of a fair trial.

...

A review of the record in the instant case reveals that neither of the prongs of the ***Strickland*** test were met. Defendant's trial counsel did not perform deficiently. Further, defendant was not prejudiced as his trial proceeded in a fully prepared manner. Thus, under the test of ***Strickland***, defendant's claim of ineffective assistance of counsel is without merit.

The Order was reviewed by The Louisiana Court of Appeal, Fifth Circuit and the Court said:

On the presentation, the application discloses no

> error in the trial court's ruling of June 21, 1999, on Relator's Application for Post-Conviction Relief. Accordingly, this writ is denied.
>
> ***State v. Leeming***, No. 99-KH-934, (La. App. 5th Cir., Sept. 3, 1999); Copy of Order is contained in State Record Supplemental, Volume 1 of 1.

Petitioner applied for review in the Louisiana Supreme Court which denied relief on April 28, 2000. ***State ex rel. Gregory Leeming v. State of Louisiana***, 1999-KH-2998 (La. 1999). In denying petitioner's ***Campbell*** claims, The Louisiana Supreme Court clearly relied upon the lower court's finding that petitioner had defaulted his grand jury challenge when he failed to challenge the legality of the grand jury venire via pretrial motion to quash. See ***Corwin v. Johnson***, 150 F.3d 467, 473 (5th Cir.), *cert. denied*, 525 U.S. 1049, 119 S.Ct. 613, 142 L.Ed.2d 548 (1998)(If the last state court reviewing a matter "summarily affirms a lower court judgment denying relief, the federal court looks to the last explained decision to determine whether it was decided primarily upon state procedural bar.")

Generally, a federal court will not review a question of federal law decided by a state court if the decision of that state court rests on a state ground that is both independent of the merits of the federal claim and adequate to support that judgment. ***Amos v. Scott***, 61 F.3d 333, 338 (5th Cir.), *cert. denied*, 516 U.S. 1005, 116 S.Ct. 557, 133 L.Ed.2d 458 (1995), citing ***Harris v. Reed***, 489 U.S. 255, 262, 09 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). To escape application of procedural default, petitioner must show "cause for the default and actual prejudice as a result of the alleged violation of federal law." ***Glover v. Cain***, 128 F.3d at 902, citing ***Coleman v. Thompson***, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not

constitute cause for a procedural default." ***Murray v. Carrier***, 477 U.S. 478, 486, 106 S.Ct. 2639, 2644, 91 L.Ed.2d 397 (1986). Thus, trial counsel's failure to recognize the ***Campbell*** issue more than seven years before the ***Campbell*** decision was rendered, would not constitute ineffective assistance sufficient to excuse petitioner's default of his grand jury claim. Additionally, petitioner's claim of ineffective assistance of counsel, based upon counsel's failure to file a motion to quash the grand jury indictment, is similarly meritless.[38]

Evidentiary Hearing
(Claim No. 4)

Petitioner claims that the trial court's failure to conduct an evidentiary hearing on his application for post-conviction relief (PCR) was in violation of La. C.Cr.P. art. 930. Petitioner argues that he was entitled to an evidentiary hearing because the issues of fact could not be determined by review of the record. The Louisiana Courts reviewed the record and applicable law in rendering their decisions. Petitioner fails to state a federal claim. Federal courts may consider a state prisoner's habeas corpus petition only on the grounds that the prisoner's confinement violates the Constitution, laws or treaties of the United States.

---

[38] Even if petitioner were not procedurally barred on his claim of grand jury discrimination, he could not prove entitlement to the benefits of the ***Campbell*** decision. ***Campbell*** was decided after petitioner's conviction became final and has not been applied retroactively to cases on collateral review by the U.S. Supreme Court. *See* 28 U.S.C. 2254 (d)(1)(requiring that *habeas* relief only be granted upon showing that the state court decision was contrary to *clearly established Federal law, as determined by the Supreme Court*). *See e.g.*, ***Patterson v. Cain***, 2001 WL 69419 (E.D. La 2001)(Supreme Court has not declared that ***Campbell*** is a new rule or law or is retroactively applicable).

(See Title 28, United States Code, Section 2241 and Section 2254(a)). It is not the province of the federal habeas court to reexamine state-court determinations on state-law questions. ***Estelle v. Mcguire***, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991). This claim has no merit.

Cumulative impact of Errors and Patent Error
(Claims Nos. 3 and 9)

Petitioner argues that each and every claim or error cited by him in his petition was harmful and prejudicial to his constitutional rights. He contends that the cumulative impact of the errors deprived him of his right to a fair trial and that the errors infected the trial to the extent that he was denied due process of law. *See* ***Derden v. McNeel***, 978 F.2d 1453 (5th Cir. 1992)(en banc), *cert. denied* 508 U.S. 960, 113 S.Ct. 2928, 124 L.Ed.2d 679 (1993). In ***Derden***, the Fifth Circuit held that federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors "so infected the entire trial that the resulting conviction violates due process." ***Cupp v. Naughten***, 414 U.S. 141, 147, 94 S.Ct. 396, 400-01, 38 L.Ed.2d 368 (1973). Relief was denied, as the Fifth Circuit concluded that cumulative error in habeas corpus review, a narrow and rare form of a due process violation, in no way applies to the facts before the court. Review of the record of the case under consideration fails to establish that Leeming's trial was fundamentally unfair or that he was denied due process of law. Accordingly, this claim has no merit.

Turning to petitioner's claim of patent error, it is noted that petitioner requests that this Court review his case for "patent error". Petitioner did not brief his request. However, he claims that the request is elf-explanatory. *Habeas* petitions shall specify

all the grounds for relief which are available to the petitioner as well as the facts supporting each ground. *see* Rule 2, Rules Governing 2254 Cases. Moreover, federal courts may only entertain a state prisoner's petition for habeas relief on the grounds that the prisoner's confinement violates the Constitution, laws, or treaties of the United States. 28 U.S.C. §2254(a). Review of the record has failed to disclose any errors of constitutional dimension which deprived petitioner of due process of law or a friar trial. This claim has no merit.

Recommendation

For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the petition of Gregory Leeming for issuance of a writ of habeas corpus under Title 28, United States Code, Section 2254 be **DENIED**.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. ***Douglass v. United States Auto Ass'n***, 79 F.3d 1415, 1430 (5th Cir. 1996).

New Orleans, Louisiana, this 5th day of October 2001.

/s/ Louis Moore, Jr.
LOUIS MOORE, JR.
United States Magistrate Judge

APPENDIX E

The Supreme Court of the State of Louisiana

STATE EX REL GREGORY LEEMING
VS. NO. 1999-KH-2998
STATE OF LOUISIANA

IN RE: Leeming, Gregory; - Plaintiff; Applying for Supervisory and/or Remedial Writs, Parish of Jefferson, 24th Judicial District Court Div. J, Nos. 91-58; to the Court of Appeal, Fifth Circuit, No. 99-KH-934

April 28, 2000

Denied.

CDK
PFC
WFM
JPV
CDT
JTK

Lemmon, J., not on panel.

Supreme Court of Louisiana
April 28, 2000

/s/ Edwin C. Gonzales, Jr.
Deputy Clerk of Court
For the Court

APPENDIX F

FILED
2001 MAY 24

UNTIED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GREGORY LEEMING	**CIVIL ACTION**
VERSUS	**NO. 98-3053**
BURL CAIN	**SECTION "T"(6)**

ORDER

This cause came from hearing on May 23, 2001, upon Motion of the Petitioner, Gregory Leeming, to Reopen Existing Application for Writ of Habeas Corpus or, in the alternative, to File As a New Petition for Writ of Habeas Corpus and For Leave to File Petition for Writ of Habeas Corpus. The Court, having studied the legal memoranda and exhibits submitted by the parties, the record, and the applicable law, is fully advised on the premises an ready to rule.

I. Background:

On November 12, 1998, Petitioner filed a Petition for Writ of Habeas Corpus in the above-referenced case, which automatically referred to Magistrate Judge Louis Moore, Jr. On December 16, 1998, Magistrate Moore issued a Report and Recommendation, in which he recommended that this Court dismiss Leeming's Petition for Writ of Habeas Corpus without prejudice for failure to exhaust all state court remedies. On January 11, 1999, this Court approved Magistrate Moore's Report and Recommendation and adopted it as its own. Accordingly, this Court dismissed Leeming's Petition without prejudice for failure to exhaust all state court remedies. However, this Court ordered that the Petition be allowed to reopen the matter within

a reasonable time following the exhaustion of his state court remedies. Additionally, this Court ordered that if and when the matter was reopened, the matter would retain its original filing date for prescription purposes.

II. Law and Analysis:

In the present motion, Petitioner avers that he formally exhausted all of his state court remedies on April 28, 200. He now seeks to reopen his Petition for Writ of Habeas Corpus, or in the alterative, to File a New Petition for Writ of Habeas Corpus in this Court. After considering the arguments of the Petitioner, the record, and the applicable law, this Court finds that the Petitioner has filed the appropriate motion within a reasonable amount of time following exhaustion of his state court remedies to reopen his Petition for Writ of Habeas Corpus. Accordingly,

IT IS ORDERED that Petitioner's Motion to Reopen Existing Application for Writ of Habeas Corpus (Doc. 15) be. and the same is hereby, **GRANTED**.

IT IS FURTHER ORDERED that Leeming's Petition for Writ of Habeas Corpus (Doc. 1) be, and the same is hereby, deemed **REOPENED**.

IT IS FURTHER ORDERED that Leeming's Petition for Writ of Habeas Corpus retain its original filing date of November 12, 1998, for prescription purposes.

New Orleans, Louisiana, this 24th day of May, 2001.

/s/ G. Thomas Porteous, Jr.
G. THOMAS PORTEOUS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX G

JPCC INTAKE BOOKING DIVISION
HEALTH SCREENING FORM

ITEM #: L-26809-90 **DATE** 12-30-90 **TIME** 2:05**PM**
PRINT NAME LEEMING, GREGORY **SEX** M **RACE** W
BIRTH DATE: MO 4 **DA** 26 **YR** 54
Also known as:_____

A. VISUAL OBSERVATIONS: **CIRCLE YES OR NO FOR EACH**

Does the inmate,

1. Have any obvious: Injury – Cast – Bandage – Deformity Amputation–Infection (swollen glands, drainage, jaundice, rash)?
   YES **NO**
2. Appear under the influence of drugs or alcohol (confused, staggering, slurred speech, unconscious)?
   YES NO
3. Are there any needle marks on the individual?
   YES **NO**
4. Have any signs of withdrawal (shaking, cramping, nausea, pinpoint pupils, perspiring, diarrhea)?
   YES **NO**
5. Appear despondent ("down" or depressed); Irrational/crazy (hearing voices/ reacting strangely)?
   YES **NO**
6. Is the inmate carrying any medication or drugs? (See #7 below)
   YES **NO**

B. QUESTIONS OF THE INMATE:
If unable to answer check here ____.

1. Taking any medications?
   YES **NO**
   If yes, what?_____ For_____
2. Ever been hospitalized for:
   Mental illness? YES **NO**
   Drug abuse? YES **NO**
   Alcoholism? **YES** NO
3. Ever tried to kill yourself?
   YES **NO**
4. Use street drugs?
   YES **NO**
5. Do you have, or think you have: Circle YES or NO
   A.I.D.S YES **NO**
   Asthma YES **NO**
   Diabetes YES **NO**
   Epilepsy YES **NO**
   Heart Trouble YES **NO**
   Hepatitis YES **NO**
   High Blood Pressure YES **NO**
   Tuberculosis YES **NO**
   Venereal Disease YES **NO**
   Ulcers YES **NO**
6. Do you have any medical problems we haven't asked about?
   YES **NO**
7. Are you now under medical care or treatment?
   YES **NO**
   If yes, what?_____ Hospital/Clinic?_____
8. Women only: Are you pregnant now? YES NO
9. Is this your first arrest?
   YES **NO**

C. **If any question is answered yes, call the medical unit now.** **Time** N/A

D. Other observations/remarks: _____

E. Did you inform the inmate about medical services
YES NO

Screening Officer Illegible

Medical Remarks: _____

INTOXICATED

ALCOHOLIC

_____

_____

(Medical Signature)

APPENDIX H

Copyright 2002 The Times-Picayune Publishing Company
The Times-Picayune (New Orleans)
September 13, 2002 Friday

SECTION: METRO; Pg. 1

LENGTH: 343 words

HEADLINE: Decision on campaign cash delayed;
Judge Bodenheimer in limbo on paying for criminal defense

BYLINE: By Stephanie Doster; Kenner bureau

BODY:

The Louisiana Board of Ethics on Thursday again put off deciding whether State District Judge Ronald Bodenheimer can use campaign money to help pay for his criminal defense, after attorneys for the judge said they would provide more information about the case.

Board members were scheduled to consider declining to issue an opinion because they had not received additional information they asked Bodenheimer to provide in July, ethics board attorney Maris McCrory said.

But Bodenheimer's attorneys told the board Wednesday that they intend to comply with the board's request, McCrory said.

The board is scheduled to re-consider whether the judge can use the money when it meets Oct. 10.

Efforts to reach Bodenheimer's attorney for civil and administrative matters were unsuccessful.

Bodenheimer was indicted in July for allegedly conspiring to plant the painkiller OxyContin in the truck of a man who had complained of drug activity and zoning violations at the judge's Venetian Isles marina.

The judge, who earns a $100,743 salary while suspended from 24th Judicial District Court, has pleaded innocent to one count of drug conspiracy and three counts of using a cell phone to commit a crime.

In a June 30 letter, Bodenheimer requested the ethics board's opinion on whether he could use campaign money to defray the costs of his defense.

"It is imperative that I be allowed to use these funds to properly defend myself in connection with this matter," he wrote.

During a July 16 meeting in Baton Rouge, members of the board put off deciding the issue until they received more information about the nature of the investigation and the charges against the judge.

They formally requested the additional facts in a July 23 letter to Bodenheimer, McCrory said.

The ethics code says campaign contributions may not be used or loaned for personal use unrelated to a political campaign or to the holding of a public office or a party position.

. . . . . .

Stephanie Doster may be reached at sdoster@timespicayune.com or (504) 467-1726.

LOAD-DATE: September 13, 2002